No. 10190.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

6

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN KABUSHIKI KAISYA, a Corporation, Bankrupt; and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corporation, and J. M. ANDERSON,

Appellees.

(And Thirteen Consolidated Cases.)

APPELLEE'S PETITION FOR REHEARING.

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MISCELLANEOUS.

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To the Honorable William Denman, Clifton Mathews and Albert Lee Stephens, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellee herein, Hermosa Amusement Corporation, Ltd., respectfully petitions for a rehearing of the appeals herein, and a re-examination of those aspects of the consolidated cause whereby this petitioning appellee was held liable to the appellants for one-half of the amounts of the judgments against the latter for deaths and loss of personal effects.

The rehearing is sought upon each of the following grounds:

1. This Court has evidently overlooked or failed to appreciate the trial court's finding to the effect that the "minimum requirements" of the local inspectors (which included the transverse bulkhead requirement) promulgated on June 3rd, 1940, had not been enforced and that the owners of the involved vessels were given a reasonable time to comply with the same. [A. 1. 132.] This finding necessarily implies that on September 4, 1940, the "reasonable time" had not expired, and that the bulkhead requirements were not binding upon OLYMPIC. The evidence strongly supports that finding and its said implications, and should be decisive of this aspect of the case.

2. The local inspectors' minimum requirements of June 3, 1940, were *ultra vires* and void, and, in effect or not, had no binding effect upon OLYMPIC. The function of local inspectors is to inspect and to apply the standards and requirements fixed by law and generally accepted concepts of seaworthiness. Local inspectors are without authority to extend or amplify those standards and requirements.

3. The burden of proof of the *Pennsylvania* is not applicable to a fault which is not a violation of a statute, or a rule to which Congress has given the force of a statute. Even if the bulkhead requirement was valid and in effect, as an administrative order, the burden of the *Pennsylvania* rule was not imposed.

4. The lack of cross bulkheads in OLYMPIC was not legally causative of the deaths or losses of personal effects.

These points are elaborated in the following discussions.

Point One.

By the decision in *United States v. Monstad,* 134 Fed. (2d) 986, it is the law in this circuit that pleasure fishing vessels of the OLYMPIC's type are subject to inspection as sea-going barges. For the purpose of this petition we accept that decision, and do not dispute that on September 4, 1940, OLYMPIC was subject to inspection. She had not been currently inspected, as directed by U. S. Code, Title 46, Sec. 395, and did not have on board the certificate of inspection as required by Sec. 398.

Section 395 requires that at least once a year the local inspectors shall inspect each sea-going barge and "satisfy themselves" that the barge is of a structure suitable for the service in which she is engaged, etc. Assuming, argumentatively, that thereby the burden and duty is imposed upon OLYMPIC to submit herself for inspection and satisfy the inspectors as to her condition, we agree in advance that the duty to submit to inspection, and to procure a certificate, is a duty imposed by law, which cannot be waived or nullified by the failure of the inspectors to make inspections or otherwise. See *City of Los Angeles v. United Dredging Co.,* C. C. A. 9, 14 Fed. (2d) 364. So, we do not claim that the failure of the inspectors to inspect the OLYMPIC, purged her of any violation of Sec. 398, or of any obligation imposed upon her by Section 395.

We do not understand that this Court has imposed upon OLYMPIC the burdens of the *Pennsylvania* rule merely because she failed to submit herself to inspection or because she did not have a certificate on board. It has imposed that burden because she did not have the transverse bulkheads which the local inspectors presumably

required before they would "satisfy themselves" as to her suitability.

It is necessary, of course, to impose the burdens of the *Pennsylvania* rule upon OLYMPIC, that she be found guilty of some specific and transitive fault which could have had causal effect upon the losses. The mere failure to be inspected and to have a certificate on board may be violations of statute, but they are, as far as any consequences are concerned, entirely passive and non-operative. To vitalize and give operative effect to these violations we must find some specific defect, or the omission of a valid requirement. This Court has held that the lack of bulkheads supplied such operative violation.

This Court postulates that as the pleasure fishing vessels had been made subject to inspection by Congress, the making of requirements, such as the bulkhead requirements, had been specifically delegated to the local inspectors by Congress. Accepting that, argumentatively, it must rest upon the proposition that the local inspectors are empowered to prescribe such requirements as they deem necessary to "satisfy themselves" that the structure of the vessel or vessels is suitable for their intended service. If the inspectors, in the course of their administrative function, have power to prescribe such requirements as bulkheads, etc., it must necessarily follow that they have power to prescribe *when* they shall become effective and be applied; to suspend them when they deem it advisable; and to repeal or abrogate them or abandon them when they can "satisfy themselves" by other means or other considerations.

It is undisputed that prior to June 3, 1940, at least, the inspectors had been "satisfied" to accept and pass these vessels without transverse bulkheads, and had ac-

cepted, as standard and proper construction, the conventional sailing ship design with one collision bulkhead, forward. The bukhead requirements of June 3, 1940 were new and revolutionary, and indicated that the old standards would no longer be sufficient to "satisfy" the local inspectors. At some time, therefore, by the will of the local inspectors, the old standards would cease to "satisfy them," and the new standards would become effectice. If that time had not come on September 4, 1940, when the accident happened, then it must follow that the old standards still governed inspections, and OLYMPIC, if inspected, would have satisfied the inspectors and would have passed and received her certificate.

If the bulkhead requirement, although promulgated on June 3, 1940, was not in effect or being enforced when the accident occurred, and its taking effect had been postponed until after the date of OLYMPIC'S loss, it must be that she was guilty of no statutory or rule fault in not having bulkheads, and there was nothing to bring the *Pennsylvania* rule into effect. The question as to whether the new bulkhead requirement was intended by the inspectors to be effective on September 4, 1940, was and is vital and essential to the proper determination of this aspect of the case.

The trial Court, upon the evidence, determined that at the date of the accident, the requirements had not been put into effect, and so found. The appellant assigned the finding as error, but did not press the assignment in its briefs in this Court. We discussed the question very briefly in our reply brief (pp. 66-7), but apparently this Court, concerned with the question of the validity *per se* of the inspectors' minimum requirements, over-

looked this finding and the evidence supporting it. Neither the finding, the assignment of error nor the evidence is mentioned in this Court's opinion, although the finding, as heretofore indicated, is essential in a decision of the case.

The trial Court ordered its opinion to stand as the findings of fact and conclusions of law. In that part of it dealing with inspections and the bulkhead requirements, the Court reviewed the history of the inspection problem, the activities of the Bureau of Inspection, and then referred to the inspectors' promulgation of the "minimum requirements" of June 3, 1940, which include the bulkhead requirement. [A. I. 131-2.] The Court then found:

> "However, these requirements had not been enforced, and the owners of these pleasure vessels were given a reasonable length of time to comply with the same." (*Id.* 132.)

Certainly, the plain intendment of that finding is, that the *minimum requirements* had not yet been put in effect by the inspectors or the Bureau of Marine Inspection and Navigation, and that when the accident occurred, the "reasonable length of time" had not yet expired as to OLYMPIC.

Counsel for the appellant fully appreciated and accepted that as the necessary implication, for they assigned the finding as error, in the following language:

> "The District Court erred in finding that the minimum requirements specified for the OLYMPIC II by the U. S. Local Inspectors * * * were not enforced, and that the owners of the OLYMPIC II *were not obliged* to comply with such minimum requirements *at the time of the collision,*" [Finding XI, A. I. 253.]

The question as to whether the new requirements were in effect was and is purely factual. The burden of proof of showing the present existence of a statutory fault was with the appellant, for although the *Pennsylvania* burden is upon an offending vessel to show that her statutory violation could not have *contributed,* the burden of showing the *existence* of the statutory fault is upon the party asserting it. To show an operative fault in this case, the appellant had to establish, by a preponderance of evidence, that the bulkhead requirement was intended to be effective and enforced on the day of the accident.

The appellants failed in their burden. They introduced the inspectors' notice of June 3, 1940, containing the minimum requirements, and the admission that they had been received by Hermosa [A. I. 388-402], and procured the admission of Captain Andersen that at the time of the loss OLYMPIC only had her regular collision bulkhead. [*Id.* 405.] That was their entire proof on the proposition that the bukhead regulation was presently effective. After we had shown that, although the new requirements were promulgated on June 1st, 1940, the inspectors had not moved to inspect OLYMPIC or other barges, and had produced in evidence the letter of Commander Field, Director of the Bureau of Navigation to the Secretary of Commerce, stating that "a reasonable length of time" had been given to OLYMPIC to comply with the new requirements, the appellants then introduced a letter written to their counsel by Captain Fisher, Supervising Inspector, in which he stated vaguely that his file showed "no record of a relaxation" of the requirements as to OLYMPIC, and that he had no recollection of granting any relaxation. [A. III. 1060.] That is the sum

of appellant's proof that the requirements were intended to be effective on September 4, 1940. The local inspectors, although readily available, were not called by appellants.

The inspectors' notice and the minimum requirements contain no reference as to when the latter should become effective, and no inference can be drawn therefrom, except, possibly, that they were to become effective *eo instante*. But if any such inference is considered, it must yield, not only on account of its inherent unreasonableness, but also upon the positive statement of the Director of the Bureau, that the effective date of the new regulations was to be after a "reasonable length of time" to enable the vessels to comply with them.

The season for these pleasure barges runs from about the middle of May until just after Labor Day in September. OLYMPIC went to her anchorage on May 9th, and intended to return to port within a few days after the day of the accident. On June 3rd, when the minimum requirements were promulgated, without previous warning, the OLYMPIC and the other barges were on their stations, and, by radio and other advertising, had established their "good will" for the season. It is obvious that if the new requirements were intended as immediately effective, it meant that every vessel would immediately have to abandon her season and head for a shipyard for weeks of work. None of them had the required transverse bulkheads or fire protection system, to mention only two of the new requirements. No vessel could possibly survive inspection if the new standards were to be forthwith applied.

There was no emergency which called for or justified the immediate imposition of the new requirements. They

had evidently been under consideration and formulation for a couple of years. Certainly without an expressed intention, it may not be assumed that the inspectors intended to put the entire pleasure fishing fleet out of business for the season, and bring heavy loss, if not financial ruin, upon these operators.

A perusal of the shipping statutes and rules of the Board of Supervising Inspectors will disclose that it has ever been the policy of Congress and of the Bureau to give ample warning and notice of the taking effect of new requirements involving substantial expense to owners. When Congress adopted the bulkhead statute, applying to steam passenger vessels (46 U. S. C. A. 482), it excluded from the requirements all vessels built prior to the effective date of the statute, and in most of the rules of the Board of Supervising Inspectors, calling for additions or changes in structure or equipment, the effective date of the rule is put months ahead. In this case, the inspectors' conduct and Commander Field's letter tell us that the inspectors and the Bureau were following that same policy.

If the inspectors had intended the new requirements to be effective *eo instante* we should undoubtedly have seen them immediately using all the resources of the Bureau of Navigation and of the Department of Justice to make them so. But, following the promulgation of the minimum requirements on June 3, 1940, the inspectors did absolutely nothing. As far as we can learn, they did not inspect or reject a single one of the dozen or more pleasure fishing barges in the district. We know they did not inspect or reject OLYMPIC. They simply waited, evidently for the expiration of the season, which, by all

reason, would mark the end of the "reasonable length of time"; for then all vessels would go into port for the winter lay-up, and their earnings for the year would be over.

At this point may we draw parenthetic attention to an inaccuracy of fact in this Court's opinion? It has said:

> "Hermosa failed to install the bulkheads, and the inspectors *refused* their certificate."

As a matter of fact the inspectors did not *refuse* a certificate. They never inspected OLYMPIC, and neither refused or granted a certificate. They simply promulgated their minimum requirements, and thereafter did absolutely nothing. No vessel was ever refused a certificate upon the ground that she did not comply with the minimum requirements.

It will be recalled that between the promulgation of the minimum requirements and the accident, Hermosa had appealed to Commander Field, complaining that the new requirements were economically impossible. [A. II. 789.] Commander Field denied the appeal, holding that the new requirements were "reasonable." [*Id.* 744.] The appeal and decision dealt with the minimum requirements substantively, but there is no implication therein that anyone considered the requirements presently in effect. His letter to the Secretary of Commerce shows conclusively that Commander Field and the Bureau did not consider them in effect then or at the date of the accident. Such also was the understanding of Captain Fisher, Supervising Inspector, as disclosed by his undenied conversation with Hermosa's people in San Francisco, when he said that "I don't want to put everybody out of work, so we may be able to work something out

when I come to San Pedro." [A. I. 403.] This testimony by Captain Andersen was not denied.

But what clinches the matter in our minds and undoubtedly settled it in the mind of the trial Court, was Commander Field's letter of March 24, 1941 to the Secretary of Commerce, which we have frequently referred to. Let us now examine that letter and its implications carefully.

The record in the trial Court in connection with its admission appears at A. II, 779-787, the text of the letter being on pages 785-7. An "A" Board, which consisted of Miss Phillips of the Department of Justice and Captains Fisher and Alger, Supervising Inspectors of the Bureau, had been convened to investigate the OLYMPIC's loss. Its report, rendered to the Bureau, had been received, and Commander Field was passing the report to the Secretary of Commerce. A passage in the report inferred that Hermosa had been remiss in failing to make the structural changes provided by the minimum requirements. Commander Field knew that was not true, so, to correct the misimpression, he wrote his letter to his Department Chief, fully explaining the situation. After quoting the pertinent part of the Board's report, he stated that, after conferences, the officials of the Bureau had decided that these barges were subject to inspection, had issued instructions covering the inspection thereof, and had notified the owners accordingly. He then said:

> "It was not deemed equitable, however, to require that the vessels *immediately* comply with the rigid requirements of inspection, and, therefore, the owners were given a reasonable length of time in which to comply with the *requirements* placed upon them. *This was true in the case of the* OLYMPIC II."

This letter is endorsed: "Accepted: Robert H. Hinckley, Acting Secretary of Commerce." It is admitted to be genuine. [A. II. 785.]

This letter was in no way motivated by this litigation. Indeed, Hermosa and its counsel were not aware of its existence until just before the trial. It was simply the act of a conscientious administrator who wanted the Secretary of Commerce to have the true picture of the situation.

To us, this letter is conclusive that the minimum requirements were not in effect or intended to be in effect by any one in the Bureau of Navigation, from the local inspectors to the head of the Bureau. The trial Judge must have found it equally conclusive, for he cast his finding in the very language of Commander Field's letter.

Commander Field was Director of the Bureau of Navigation, charged by statute with the duty to "superintend the administration of the steamboat inspection laws * * * and produce a correct and uniform administration of the inspection laws, rules and regulations." (46 U. S. C. A. 372.) Certainly, no one could speak with greater authority concerning the official acts and intentions of the Bureau and of its board or subdivisions. It will be noted that he speaks of a conference between members of the Bureau and decisions reached thereat, and that a "reasonable length of time" *was given* to the owners, including OLYMPIC's owners, to comply with the *requirements*. Certainly, he thus speaks of the official acts and intentions of the local inspectors, and of whomsoever else in the Bureau whose concurrence was necessary to give their acts official force.

It is true that neither Commander Field's letter nor the trial Judge's finding says, in so many words, that the "reasonable length of time" had not expired on September 4th, but if the language of the letter or the finding is to be deemed other than purposeless, such meaning must be taken as intended. The Commander's letter would be meaningless unless he had intended to convey the idea that the reasonable time had not expired on the date of the accident, and the Court's finding would lose all significance without the same intention.

We submit that, by overwhelming preponderance of evidence, it was established that the reasonable length of time had not expired, and that the minimum requirements were not intended to be effective as to OLYMPIC on the date of the accident. There is a clear inference, under all the evidence, that the reasonable length of time contemplated by the inspectors and the officials of the Bureau, was co-extensive with the current fishing season.

We need not remind this Court of its own reiterated rule as to the presumptions in favor of a trial Court's findings on issues of fact, and its consistent holdings that it will not reverse on factual issues, unless the findings are contrary to the weight of evidence. We cannot believe that this Court has consciously ignored this vital issue of fact, or that, after review, it will find that the great weight of evidence is not with the trial Judge's finding.

We have conceded, argumentatively, the substantive validity of the local inspectors' minimum requirements. It will be understood, of course, that the concession does not "go," except for the purposes of the instant discussion. If the minimum requirements were not effective on September 4, their validity or unvalidity is immaterial,

for even valid requirements of the local inspectors could not impose the burdens of the *Pennsylvania* rule if they had not yet been put into effect. As we see it, therefore, unless this Court holds, upon the evidence, that the minimum requirements *were in effect* on September 4, 1940—all questions as to the validity of the bulkhead requirements are out of the case, and the trial Court's decrees should be affirmed as rendered.

There should be no thought that we are making any claim that the Bureau or the local inspectors did or could relax the requirements of statute that the pleasure fishing vessels be inspected as sea-going barges. The *Monstad* decision by this Court determines, as a matter of law, that they were subject to inspection, regardless of what Hermosa or the Bureau or the inspectors currently thought about it. We concede that the duty to inspect and the obligation to submit to inspection could not be avoided or waived by any non-action by the inspectors or by Hermosa. She should have been inspected. But until the new standards of the minimum requirements came into operative effect, no vessel could legitimately be inspected by those standards, and no vessel could be legitimately rejected because she did not have transverse bulkheads. The taking effect of the new requirements was not determined by law, but by the will of the local inspectors and of those entitled under the law to approve, disapprove or review their acts. The making of these minimum requirements, says this Court, is an administrative function. So, we submit, is the decision as to when they shall go into effect.

Point Two.

The *Pennsylvania* rule has been on the books for seventy years, and has been cited and applied scores of times. Yet, in so far as our extensive research has disclosed, never, until the decision of this Court herein, has its burdens been imposed upon any vessel or owner for alleged violation of any rule, requirement or specification of a board of local inspectors or other administrative official. The rule has ever been applied to violations of the statutes or ordinances of a duly constituted legislative body, or rules and regulations formally promulgated by the Board of Supervising Inspectors, pursuant to direct delegation by Congress, which expressly gives to the formal enactments of that Board the force of law. Patently, the promulgations, general or specific, of a local board have not been given the force of law even when they are clearly within the power of the local boards. We submit, therefore, that the decision in this cause constitutes a revolutionary and unprecedented extension of the *Pennsylvania* rule, and that in the rendering of it, this Court has overlooked or failed fully to consider a number of very cogent and significant factors.

The *Pennsylvania* rule has been variously restated, but let us take as reasonably typical this Court's restatement of it in *The Denali*, 112 Fed. (2d) 952, 955:

> "The rule and presumption established in The Pennsylvania control in libels . . . where the vessel has violated the *positive command* of a safety statute . . ."

Add to that language the words "or rule of the Supervising Inspectors having the force of statute, and we have a good, up-to-date and complete restatement of the *Pennsylvania* rule for any purpose connected with shipping.

Now let us turn to the acts of Congress from which the local inspectors must derive whatever power they have, and see if by any reasonable process of logic we can find warrant for giving their requirements or specifications the force of law.

Section 375, Title 46, United States Code, is the fountainhead section which gives any rule making power to any instrumentality of the Bureau of Marine Inspection and Navigation. It vests that power exclusively and for limited purposes (*i. e.*, to establish *all* necessary regulations to *carry out . . . the provisions of this and the following chapter . . .*) in the Board of Supervising Inspectors, and provides that *when* these rules are formally adopted, *and* approved by the Secretary of Commerce, they shall have the force of law. In addition to this general delegation, there are a score or more specific delegations of power to make rules, specify materials and equipment, and approve standards, tests and devices, but the delegations are *invariably* to the Board of Supervising Inspectors; or to high officials of the Department of Commerce,—the Secretary or the Director of the Bureau. Exemplary statutes are: Secs. 380, 381, 391, 396, 408, 412, 465, 472, 473, 476, 481, 482 (this is the passenger steamer bulkhead statute), 487, 489, and the more recently adopted sections, 368, 391a, 392, 411, 526c and 526p., which will be found in the U. S. C. A. pocket supplement.

If Congress had intended to delegate to *local inspectors* any rule making power, or the power to prescribe standards and requirements for safety, or to clothe such inspectors' orders and directions with the force and effect of a statute, it would have so provided in its enactments.

On the contrary, it delegated those powers exclusively to the Supervising Board, and required the approval thereof by the Secretary of Commerce before even that Board's enactment attained the force of law. We submit, the whole statutory scheme indicates conclusively that Congress never intended the local inspectors to have any discretion in fixing standards or requirements for any class of vessels, but reserved that power exclusively to itself, except in the instances and to the extent that it has specifically delegated the power to the Supervising Board.

Let us look briefly at the minimum requirements promulgated by the local inspectors on June 3, 1940. They purport on their face to deal with "inspection and certification of non-self-propelled pleasure vessels," and to constitute "*general provisions*, constituting minimum requirements (which) shall be followed in the inspection and certification of such vessels." [A. I. 392.]

That is not inspection. That is pure legislation, or rather, attempted legislation. This promulgation purports to carve out of the general classification of sea-going barges, a special class of sea-going barges, consisting of *all* non-self-propelled vessels anchored at sea which are patronized by the public for pleasure purposes; and, without a scratch of authority from Congress, to impose upon *all* those vessels, regardless of their individual seaworthiness or suitability, general requirements as drastic, if not more drastic, than Congress has ever seen fit to impose upon any class of vessels afloat!

The powers vested in the local inspectors by Congress, with respect to sea-going barges, are found exclusively in Section 395. They are, that at least once each year the local inspectors "shall inspect the hull and equipment of

every sea-going barge . . . and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed; has suitable accommodations for her crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life." The power is to inspect and to satisfy themselves. There is no power, either before or after inspection, to impose general standards or general requiremnts in excess of those prescribed by Congress or the Supervising Board under Congressional authority. Indeed, they have no power as to any vessel *until* they have made an inspection. Then they have only the power to certify her if she satisfies them, or reject her if she does not.

This Court infers, in the opinion, that the local inspectors have the power and duty to "satisfy themselves" and they alone can say, by general requirement or otherwise, what will satisfy them. It is the implication of the decision that the only limitation upon this power is that its exercise shall not be arbitrary or irrational. If that be so, any board of local inspectors has power to require almost any sort of structure and equipment for any class or group of vessels, and run them off the seas if their owners do not or cannot comply. Let us consider a few possibilities, always within the bounds of reason:

An act of Congress requires not less than *three* cross bulkheads for sea and lake-going passenger steamers of over 100 tons. (Sec. 482.) A board of safety minded local inspectors might decide to require *six* to "satisfy themselves" of the suitability of all such steamers, and forthwith half of the steamers in their district would be unable to obtain certificates. The Rules of the Supervising Inspectors (Rule 63.14; 1942 issue) provide that

in the inspection of hulls, boilers and machinery, the Rules of American Bureau of Shipping shall be taken as standard by local inspectors, except as otherwise by these rules provided. Some local board may claim to be dissatisfied with American Bureau standards and prescribe heavier plates, stronger frames, more bulkheads, and different boilers, and certificates would be denied to every vessel built to American Bureau standards. Magnetic compasses, capable of proper adjustment, are considered as sufficient equipment for most vessels, and neither Congress nor the Supervising Board has ever prohibited their use. A local board might say: gyro compasses are better and safer; we shall not be "satisfied" unless all ships in our district are equipped with gyro compasses.

We might extend the possibilities indefinitely. A local board might even say, without being arbitrary or irrational—we require all ships of our district to be equipped with these new radar devices; then there will be no more fog collisions. The writer hopes to see the day when radar equipment will be required by law on every vessel at sea, but that is not the law yet. Neither is it the law as yet that sailing vessels or sea-going barges carrying passengers have to have water-tight bulkheads.

We earnestly submit that the power, vested in local inspectors by statute, to inspect and satisfy themselves, cannot contemplate anything more than that the local inspectors shall apply existing standards which rest upon statute, upon the rules of the Supervising Inspectors or, in the absence of either, upon the currently accepted standards of seaworthiness in the maritime world and in the locality of the vessel's operations. Those are the standards which bind the courts in determining factual issues

as to seaworthiness, and which certainly must bind ministerial offices such as the local inspectors.

If Congress had seen fit to create a new class of seagoing barges and impose upon them the standards and requirements of passenger carrying steamers, it would have so enacted. If it had intended that the Supervising Board, or a local board should have such power, it would have so enacted. Where it has intended that the Supervising Board should act for it in prescribing standards of safety, it *has* so enacted. But it has never intended and never enacted that any rule or standard making power should rest in the local boards. Any implication of such power to them permits local inspectors to become the final arbiters of the right of any vessel to be on the seas, whether she be sub-standard or super-standard, and to impose upon any class or group of vessels, standards of safety which Congress has deemed neither necessary nor advisable.

There is no judicial authority upon this point, for, apparently, there was never another case where local inspectors have arrogated to themselves the power to create a new class of vessels and establish requirements of safety for it. We have found a few cases which deal with the validity of Supervising Inspectors' rules, and some of them are most interesting, as they deal with the limitations on the rule and standard making power of that board, which *is* the design of Congress for any delegated power in those respects.

In *Williams v. Molther,* C. C. A. 2, 198 Fed. 460—it was held that the rule making power vested in the Board of Supervising Inspectors by Section 375 was confined to the making of regulations "necessary to carry out the provisions" of designated acts of Congress, and did not

authorize the imposition of conditions upon the granting of a license to a pilot, which were not required by the statute or necessary to accomplish the purpose of the statute. The rule involved required three years of deck experience of the candidate. The trial Court had taken the view that this rule, among others, was necessary and proper to "carry out in the most effective manner" the provisions of law and to "satisfy" the inspectors as to the candidate's qualifications. The Appellate Court reversed; holding that the making of such a regulation was in the power of Congress alone, and while the inspectors might examine and reject an applicant if they found him in fact lacking in adequate deck experience, the Board could not apply an arbitrary rule requiring a particular apprenticeship. The Court said:

> "The rule imports into the law a condition not found in it, and we do not think it is necessary to carry out the provisions of the title, or even useful or appropriate for that purpose, as it may prevent citizens entirely competent from obtaining a license. Moreover as we stated in our previous opinion, 'such or similar regulations might easily be used to create a dangerous monopoly in the business of pilots and marine engineers.'" (p. 464.)

That decision is very pertinent to the case at bar, for if we substitute the bulkhead requirements for the Supervising Board's rule, and Section 395 for the licensing statute, we have an exact parallel. Bulkheads as required by the local inspectors are not required by law as a condition to granting a certificate of inspection, and, certainly, local inspectors are without power arbitrarily to impose such requirements *as* a condition.

In *United States v. Miller* (S. D. N. Y.), 26 Fed. 95, —Judge Addison Brown held that the Board of Supervising Inspectors had no power under Section 375 to impose regulations as to lights to be carried by barges, for Congress had undertaken the regulation of lights on vessels, and had vested no power in the Supervising Inspectors to augment its legislation by rule. Said the Court:

> "Nothing in that title (R. S. Title 48, dealing with lights) gives any power to the Supervising Inspectors to add to those (statutory) requirements." (p. 99.)

We submit, nothing in any Congressional legislation gives any power to *local* inspectors to add to the requirements of Congress as to sea-going barges, or any other class of vessels.

In *The Eleanora* (C. C. N. Y.), 8 Fed. Cas. No. 4335, it was held that the Board of Supervising Inspectors had no power, under the acts of Congress, to regulate the navigation of sailing vessels; the power granted to them being expressly related to steam vessels; and therefore their "recommendations" as to the navigation of sailing vessels did not have the force of law, although, when long established and generally adhered to, they might furnish a standard of good seamanship. (p. 426.)

Congress has enacted certain requirements as to seagoing barges. Possibly, from a social point of view, that legislation is sketchy and unsatisfactory. It has also legislated to require cross bulkheads as to certain classes of vessels (passenger steamers; Sec. 482), and *has not* required them in sailing vessels carrying passengers, or in seagoing barges. This also may be inadequate and

unsatisfactory from the social standpoint. But only Congress or its lawful delegate can supply lack in the statutory plan. It is clear that nothing in any statute authorizes any additions to Congressional requirements by any rule, requirement or act of the local inspectors. They are not Congress' delegate.

We doubt if these bulkhead requirements could lawfully be imposed, even by formal promulgation by the Board of Supervising Inspectors and the approval of the Secretary of Commerce, for, Section 375 only gives them the rule making power to make "necessary regulations to *carry out* in the most effective manner the provisions of this and the following chapter." It does not empower them to add new requirements. But we need not consider that question, for these bulkhead requirements were never adopted as a regulation by the Supervising Board or approved by the Secretary. By no stretch of imagination can they be given the force of law.

This Court says of the requirements of the local inspectors as to bulkheads:

> "Here was an administrative function of a local matter which Congress had specifically delegated to the local inspectors. They, and nobody else could perform it. Compare Morgan v. United States, 298 U. S. 468."

We cannot believe that the Court means that literally, for if it does, the decision holds that Congreses has ceded to the forty odd boards of local inspectors, the power, in their several districts, to prescribe what shall be the structure and equipment of any or all vessels, and to deny them the use of the seas if they do not or cannot comply. Such a concept of administrative function is simply be-

yond our comprehension, for it means that any board of local inspectors, by the device of prescribing minimum requirements in excess of those of Congress, may completely thwart the expressed intentions of Congress. Under such powers, and well within the bounds of apparent rationality, venal inspectors might create in their districts an unassailable monopoly for favored ships or operators; or inspectors, super-safety minded, might drive half the ships in their district to the ship brokers.

We suggest that what the Court intended to say was that the *function of inspection,* not the function of prescribing requirements, was the administrative function which had been delegated to the local inspectors and which they alone could perform. With that we fully agree.

As we understand the intent of Congress, it is that vessels shall be inspected and certificated by the local inspectors, who are to apply the standards of seaworthiness of the maritime world, as extended, modified or relaxed by the specific enactments and requirements of Congress, or by the duly enacted and approved rules of the Supervising Inspectors. The local inspectors must first *inspect.* When they have inspected, applying those standards, their function is to certify or reject. If they find a vessel to be up to those standards,—suitable *by those standards* to perform her function,—they must certify her. Failure to do so is an abuse of function. If she is found to be sub-standard, they must reject her, and such failure is a like abuse of function. But if local inspectors say that they are not satisfied with prescribed standards and requirements, and undertake to impose higher standards and additional requirements, then they are ceasing to perform an administrative function, and are assuming a legislative or dictatorial function.

We respectfully insist that local inspectors, in advance of inspecting a ship and ascertaining whether she is suitable by prescribed or recognized standards, cannot impose, either as to a specific ship, or a group or type of ships, requirements in excess of the requirements of law or of generally accepted standards of seaworthiness. To do so is legislation. We further insist that local inspectors cannot, *after* inspection of a specific ship which is standard in hull and equipment, reject that ship, on the sole ground that she lacks some sort of structure or equipment which the law or generally accepted standards do not require of vessels of her type and in her service. To do so is legislation and *discriminatory* legislation.

Suppose the local inspectors, as was their duty, had inspected OLYMPIC on or before the date of the accident. Would they have properly performed their function to "inspect—and satisfy themselves." (Sec. 395. The general inspection section 391 says "carefully inspect and satisfy.") by looking into the hold, and saying "rejected, no bulkheads"? Certainly not, for no law, no regulation and no generally recognized standard of general seaworthiness requires more than the collision bulkhead in non-mechanically propelled vessels. The collision bulkhead was there, and the hull was tight and strong. She was standard by every test of law and every test of practical seaworthiness which the courts have ever recognized. They could not lawfully have rejected her.

This Court has invited a comparison of the case of *Morgan v. United States*, 298 U. S. 468. We see in this case a strong authority for Hermosa, not only upon the point for which this Court cited it (p. 481), but upon our position that inspection by local inspectors must be had in accordance with the standards imposed by law.

On page 479, the Supreme Court said:

> "The secretary as the agent of Congress in making the rates must make them in accordance *with the standards and under the limitations which Congress has prescribed.* Congress has required the Secretary to determine, as a condition to his action that the existing rates are or will be 'unjust, unreasonable or discriminatory.' *If and when* he so finds, he may 'determine and prescribe' . . ."

In our case, the local inspectors are authorized to *inspect,* and then to satisfy themselves (determine) that the vessel's structure is suitable. They must do so under the standards and limitations which Congress has supplied —not upon their own standards. These local inspectors did not inspect OLYMPIC and did not, as a result of inspection, determine whether OLYMPIC's structure would or would not "satisfy them." They simply promulgated their own standards by fiat.

On the point for which this Court cited the *Morgan* case, it is entirely with Hermosa's position. The Supreme Court held that where Congress had delegated to the Secretary, legislative and judicial functions, he and he alone, could perform it. If Congress has delegated any legislative power to anyone to prescribe additional requirements for sea-going barges, the delegation was made solely to the Supervising Board and the Secretary of Commerce. They, alone, can prescribe such requirements.

It is most earnestly submitted that there is absolutely no warrant or authority in law for the local inspectors to impose their bulkhead requirements upon OLYMPIC, and that the trial Court was absolutely correct in holding that the minimum requirements of June 3, 1940 were a "nullity."

Point Three.

There are two statements in the opinion of this Court that we are having difficulty in rationalizing. They are those which say, in substance, that because of Hermosa's violation of the *statutory* requirements, it has the burden of the *Pennsylvania* rule to show that the absence of the *required bulkheads* could not have contributed. This seems to us to involve some confusion of concept.

We assume the Court holds that Hermosa violated the statutes requiring sea-going barges to be inspected and be issued a certificate. Her wrongs or faults, then, were that she had not been currently examined by the inspectors and did not have a certificate. There are the only violations of which she could be guilty. But we cannot, from a causal standpoint, even relate those violations to the sinking of OLYMPIC, the death of any person or the loss of any property. Inspected or not; with or without a certificate; OLYMPIC, struck by SAKITO as she was struck, would have gone to the bottom at the same identical moment by the inevitable laws of physics. It must follow that the Court has not held OLYMPIC liable for her statutory violations *per se*.

We realize, of course, that the practical ground upon which the Court sees contributive fault is the actual lack of the bulkheads, and the burden of the *Pennsylvania* rule has been imposed because the local inspectors purported to require such bulkheads and OLYMPIC did not comply. So, the *essential* fault must be that OLYMPIC violated, not the inspection statutes as such, but these local inspectors' requirements.

These requirements, valid or invalid, are not statutory, and Congress has never given to any rule, requirement or

order of *local inspectors* the force or effect of statute. And unless they are given that force and effect, we submit that there is no principle or authority which justifies the imposing of the unusual and drastic burdens of the *Pennsylvania* rule.

The *Pennsylvania* burden is not the usual burden in tort cases, in admiralty or at common law. It is unusual and exceptional. There are scores of faults which will impose civil liability which do not raise it, and as to which causal effect must be proved by the party charging it by a preponderance of evidence. We have in the books many cases where the most outrageous faults in seamanship, in the structure of vessels, and in the failure to take the most elementary precautions, where the *Pennsylvania* principle has been ignored or expressly rejected, because no direct statutory fault was involved. Lookout cases are a good example. Nothing is so elementary as the duty to maintain a proper lookout, and the prudential rule, Article 27, contains an express statutory injunction that nothing in the International or Inland Rules shall exonerate any vessel or owner from the consequences of neglect to keep proper lookout. Yet, because there is no statute or statutory rule directly *commanding* the maintenance of a lookout, the *Pennsylvania burden* has always been withheld in lookout cases.

In *The Blue Jacket,* 144 U. S. 371, 390, the Supreme Court refused to apply the burdens of the *Pennsylvania* case to a vessel deficient in lookout, saying:

> "The provisions of Article 24 of the Act of Mar. 3, 1855 is that a vessel is not to be exonerated from the consequences of any neglect to keep a proper lookout. It does not say that a vessel shall, because

of not keeping a proper lookout, be visited with the consequences of a collision. If the collision does not result as a consequence of neglecting to keep a proper lookout, the vessel is not thereby made responsible for the consequences of the collision, and the exemption of the tug, necessarily results from the finding *as a fact* that the absence of a proper lookout in no wise contributed to the collision."

Individual views as to what does and does not constitute a seaworthy or "suitable" vessel may differ widely. It is now the concensus of law and maritime thought that steamers over a certain size should have cross bulkheads. That stage of thought has not yet been reached as to non-mechanically propelled vessels. In a few years we may reach it. Sometime during that transitive period a time will come when nautical thought will be equally divided. Let us assume we had reached that stage in 1940, and a board of local inspectors could say with justification that by the ordinary maritime standards, a sailing vessel should have cross bulkheads. Another local board, in the same or an adjacent state, might say with equal justification, that the usual collision bulkhead is all that current standards should require. Conceivably this Court might have to sustain both views as applicable to inspections in the respective districts.

Now let us suppose that OLYMPIC, from Southern California, and an identical vessel from San Francisco had anchored side by side on a fishing bank; that each was without bulkheads, and each had conducted herself exactly as OLYMPIC had conducted herself on the day of this accident. Suppose SAKITO came along, and by identical conduct, ran into and sank the two of them. Suppose iden-

tical litigation had been had in each case. This Court would find itself exonerating the San Francisco vessel and condemning OLYMPIC for identical conduct, simply because the inspectors at Los Angeles and those at San Francisco entertained different views as to whether an anchored fishing barge should have cross bulkheads.

We have presented this hypothetical catastrophe because it seems to us most forcibly to illustrate the wisdom of confining the drastic *Pennsylvania* rule to the cases for which it was designed;—the direct violation of law itself, voiced by a uniformly applicable statute or a uniform rule to which the legislative authority has given the force of statute.

In applying the *Pennsylvania* rule, we submit, a distinction must be preserved between the commands of the law and the commands of ministerial administrators in the execution of it. A Coast Guard cutter, policing the seas, orders a ship into port for some real or fancied statutory fault. The ship's master ignores the command, continues on his course, and later comes into a collision. In ensuing litigation, the application of the *Pennsylvania* rule will depend upon what? Proof that she violated the *law* or proof that she violated the police vessel's order?

The correct answer seems obvious. The law speaks with its own voice. The ministerial or enforcement officer may command by *authority* of the law, but his commands are not the law itself, unless the legislature expressly makes them so.

The *Pennsylvania* rule, after all, is a rule of evidence. The substantive law is that liability follows causal fault, duly proved, and that remains unchanged, whether the *Pennsylvania* burden or the regular burden is applied. A rule of evidence must be of uniform application, and cannot properly be applied as to "A", and withheld as to "B", because of the pronouncement of a ministerial officer or functionary.

The most solemn and reiterated adjudications of the highest court will not necessarily invoke the *Pennslvania* burden as to a proved fault, because the rule applies, not to judicial commands, but to statutory commands. Neither does it apply to ministerial commands.

We most respectfully submit that in holding Hermosa to the burden of proof of the *Pennsylvania* rule in connection with these bulkhead requirements, this Court has flown the rule out into the legal stratosphere where neither principle nor authority can bear it up.

We submit that the *Pennsylvania* rule may legitimately be applied only when a vessel or owner has directly violated the positive command of a statute or statutory rule; —a direct "thou shalt" or "thou shalt not" of the legislature or its express delegate, which can be plainly read or clearly implied from a written law, and which violation, when related to the consequences of the accident, can be, of itself, a proximately causal factor. It will be found, we think, that every case which has applied the *Pennsylvania* rule, is strictly within those limitations.

Point Four.

By the holding of two courts, OLYMPIC was blameless for this collision. Her bulkheads or the lack of them did not cause the collision. Seaworthy or unseaworthy, a law breaker or a law keeper, her condition and her conduct had no causal effect. The trial Court and this Court have so held.

When we try to apply the logic of cause and effect to these deaths and the loss of personal effects, we cannot perceive any chain between OLYMPIC's lack of cross bulkheads and these sad consequences. We can, of course, follow the theoretical proposition that if OLYMPIC had had several more bulkheads than she did have, she might have stayed afloat a few minutes longer, and other lives might have been saved. But that is equivalent reasoning to saying that if the OLYMPIC had been the *Queen Mary* she would not have sunk because of her great size, and if she had been the launch *Midget* she would have sunk because of her small size. That is circumstance, not cause.

What, we ask ourselves, was the proximate cause of the OLYMPIC sinking when she did? We can only see one answer:—the collision! That cause fills every inch of the canvas, *Pennsylvania* rule or no *Pensylvania* rule. OLYMPIC's physical condition, whatever it was, was merely a circumstance in the case, or, as the courts have often said, a "condition" of the losses, not a cause.

Suppose OLYMPIC had been lying at anchor on September 4th, sorely injured in a previous accident. Suppose the previous accident had been caused by her own statutory fault. She is unseaworthy through her own fault, but she is still afloat and will remain afloat until help

comes. Her passengers are all on deck, scared but safe. Now comes SAKITO, under identical circumstances as in the case at bar, smashes into her, and she sinks. Are not SAKITO's faults the proximate cause, and the sole proximate cause of the deaths? Is not OLYMPIC's condition, however brought about, a *condition* of the deaths and not a cause? It seems to us inevitably so.

We cannot distinguish the real OLYMPIC's situation from many cases, some of which were decided by this Court, where a vessel was guilty of statutory violation by being on the wrong side of a channel or anchored in an unlawful anchorage. Another vessel comes along, sees her, appreciates her situation, has the power to avoid her, but fails to do so. The fault in being on the wrong side of the channel or improperly anchored does not have causative effect, and the proximate and sole cause of the collision and its consequences to both vessels is the bad navigation of the other.

This principle is firmly established in the Second Circuit by a considerable line of recent cases, and the propriety of applying the *Pennsylvania* rule has been squarely considered and rejected.

The most recent pronouncement is *Mattoon Oil Corp. v. The Greene,* 129 Fed. (2d) 618, 620, wherein the Court did hold a vessel on the wrong side of a channel contributively at fault under the *Pennsylvania* rule, for her proofs had not shown that her unlawful position did not actually impede the other's navigation. But the Court expressly approved and distinguished its other cases, where a different conclusion had been reached. It said:

> "For this statutory fault she must be held responsible unless she proved that it could not have con-

tributed to the collision. *The Pennsylvania; Lie v. San Francisco & Portland S. S. Co.* While *recognizing this principle,* we have often exonerated vessels out of position when it appeared that 'the . . . fault was a condition, not a cause of the collision.'" (Citing cases.)

The cases cited are:

The Socony, No. 19, 29 Fed. (2d) 20, 22;
The Clara, 55 Fed. 1021;
The Perseverence, 63 Fed. (2d) 788;
The Syosset, 71 Fed. (2d) 666;
The Bellhaven, 72 Fed. (2d) 206;
Construction Aggregates Co. v. Long Island R. Co., 105 Fed. (2d) 1009.

This Court has reached precisely the same conclusions in the following cases:

American Hawaiian S. S. Co. v. King Cole Co., 11 Fed. (2d) 41, 43;
The Yucatan, 226 Fed. 437, 439;
The Europe, 190 Fed. 475, 481.

In those cases the Court does not discuss the *Pennsylvania* rule by name, but that it was fully conscious of it is demonstrated in *The Europe,* where it was said:

"A harmless fault, (anchor lights not complying with the statute), *even where a positive mandate of a statute has been disobeyed,* cannot be made the basis for the recovery in a civil suit, or palliate the fault of another *which does inflict the injury.*" (Citing and quoting from the *Blue Jacket,* 144 U. S. 371, 390.)

Let it not be thought that we cannot distinguish between factors contributing to a collision and factors contributing

only to a consequent loss, such as these deaths and property losses. We concede that if OLYMPIC had been guilty of some positive fault or negligence toward her patrons or toward the property on board her, after the collision, from which a trier of fact might reasonably find that lives or property were lost, which otherwise would have been saved, we would have an independent and intervening *proximate cause* and even, possibly, a sole cause. But mere passive condition of a vessel, which is incapable in itself of causing harm to her own people, or of influencing or affecting the conduct of the colliding vessel, cannot, we submit, be a factor in liability.

As we have said, the *Pennsylvania* rule is not a rule of ultimate liability, but a rule of evidence fixing the burden of proof. It is applied as tending to establish the proximate cause of an injury. The *sine qua non* or "but for" reasoning which it suggests, must result in conviction, not that the violation could have been a circumstance in the loss, but that it could have been a *cause* of the loss. When the *Pennsylvania* burden has been applied to any factor in any case, we still have the question of *ultimate fact*: Did this violation, or fault or circumstance, *proximately cause or proximately contribute* to this loss? That question is essentially and entirely factual, and its ultimate resolution rests upon the trier of the facts, upon the entire evidence in the case, and his reasoning powers as to cause and effect.

Let us give one more hypothetical case. Assume, arbitrarily, that the *Pennsylvania* rule applied to this situation:

A sidewalk cellar door does not have sufficient strength literally to comply with the requirements of a municipal safety ordinance, but is in fact amply sufficient to sup-

port ordinary traffic. "A" is crossing or standing on the door, and "B" negligently drops a safe on the door which crashes through it and drops "A" to death or serious injury. "A" sues both "B" and 'C", the maintainer of the door. The Court decides or instructs a jury that the *Pennsylvania* rule applies to "C". If the finding should be that the sole proximate cause of "A's" injury was "B's" negligence in dropping the safe, would this Court reverse, on the reasoning that a door of statutory strength *might* have resisted the safe long enough for "A" to step off?

Surely not, yet that is precisely what this Court has done in the case at bar. The trial Court in its final decree [A. I. p. 146] found as facts:

> "That the collision . . . was due *solely* to the faults of *Sakito Maru* . . . in the respects in said opinion set forth; that neither the said collision, *nor any of the consequences thereof,* was due to any fault, omission or neglect on the part of the *Olympic II* . . . in any of the respects alleged in the answer . . . or cross-libel herein or otherwise."

Apply, if we must, the *Pennsylvania* rule to the OLYMPIC's lack of the required bulkheads, and reach the conclusion that if she had had them she might have stayed afloat a few minutes longer. Still, there remains the essential factual question: Was that lack of bulkheads a circumstance or condition of the accident, or a proximate cause of the deaths and loss of effects?

The trial judge's findings negative the latter, and are supported, we submit, by the facts and by essential logic.

Conclusion.

If a rehearing be granted, we shall ask leave to urge a reconsideration of our motions to dismiss the separate appeals as to the death and personal effects claims, for the reasons stated in the brief accompanying our motion, and also of the application to this novel situation of the major-minor fault rule. We have not presented those matters in detail in this petition because of lack of time, and because the four points herein discussed seem to involve more vitally what we see as the essential flaws in this Court's conclusions. Enough has already been said, we hope, to convince the Court that in the interests of justice a rehearing of this aspect of the case should be granted, and for such a rehearing Hermosa respectfully prays.

Respectfully submitted,

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
ALLAN F. BULLARD,

Proctors for Appellee, Hermosa Amusement Corporation, Ltd., Petitioner.

Certificate of Counsel.

I ALFRED T. CLUFF, of Counsel for Petitioner above named, do hereby certify that the foregoing Petition for Rehearing is, in my judgment, well founded and is not interposed for delay.

New York City, N. Y., August 12, 1943.

ALFRED T. CLUFF.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN KABUSHIKI KAISYA, a corporation, Bankrupt, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a corporation, and J. M. ANDERSEN,

Appellees.

(And Fourteen Consolidated Appeals.)

No. 10,190

Jun. 28, 1943

Upon Appeals from the District Court of the United States for the Southern District of California, Central Division

Before: DENMAN, MATHEWS and STEPHENS, Circuit Judges.

DENMAN, Circuit Judge:

Sterling Carr, as Trustee in Bankruptcy of Nippon Yusen Kabushiki Kaisya, a corporation, Bankrupt, hereinafter called Nippon, and Fidelity and Deposit Company of Maryland, a corporation, appeal from an interlocutory decree in admiralty holding Nippon solely in fault for a collision of its Japanese Motorship Sakito Maru, motoring toward Los Angeles Harbor, with the pleasure fishing barge Olympic II, owned by appellee, Hermosa Amusement Corporation, Ltd., a corporation, hereinafter called Hermosa, the Olympic being anchored at bow and stern while fishing at Horseshoe Kelp in the Pacific Ocean, approximately 3¼ nautical miles from the lighthouse on the west breakwater of Los Angeles Harbor, whereby the Olympic became a total loss, several persons on her were drowned and personal effects lost.

A. *The Sakito's liability for the sinking of the Olympic.* The Sakito, crashing into the anchored Olympic, has the burden of

overcoming the presumption that she was at fault and the Olympic not at fault in causing the Olympic's sinking.

In admiralty this presumption does more than merely require the Sakito's going forward and producing some evidence on the presumptive matter, as in civil suits. Cf. New York Life Insurance Co. v. Gamer, 303 U. S. 161, 171. It places a "burden of proof" on the moving vessel "to show either that the steam-tug [the moving vessel] was without fault or that the collision was occasioned by the fault of the schooner [the anchored vessel], or that it was the result of inevitable accident." The Clarita and The Clara, 23 Wall. 1, 13; The Oregon, 158 U. S. 186, 193; United States v. King Coal Co., 5 F. 2d 780, 783 (CCA-9). Here there is no evidence warranting a finding of inevitable accident.

All the crucial witnesses on both sides testified in open court, with the exception of the Sakito's first officer and lookout. Their testimony, given by deposition in advance of the trial, was in the main consistent with the story of the Sakito's master, who was heard by the court.

There is abundant testimony of these witnesses, heard by the trial court, from which that court could infer that Horseshoe Kelp is a customary and proper place for the anchorage of the fishing barge and that in no way did the Olympic cause an obstruction to the proper navigation of vessels approaching or leaving the harbor.

So far as concerns the Sakito's burden of proof of her charge that the Olympic's crew failed to give the proper signals in the existing fog conditions, and that the Olympic was not properly manned, the Olympic's crew's testimony and that of persons on nearby vessels was heard by the trial court and seems to us acceptable for sustaining even a burden of proof on the Olympic of her lack of fault. True, as to the signals, it is opposed in part by the depositions of the Sakito's lookout and mate, but there is nothing in the cold pages before us of *all* these witnesses which places us in a position to attempt to reverse the decision of a court which had the opportunity of appraising the mental capacity, memory and veracity of so many witnesses. The Ernest H. Meyer, 84 F. 2d 496, 501 (CCA-9). We sustain that court's decision and hold, not only has the Sakito not maintained her burden of proving fault in the manning of the Olympic or in the conduct of her

crew but, that the latter is shown to be without fault contributing to the collision.

Similar conditions apply to the burden of proof on the Sakito to show she was without fault in her navigation into the Olympic.

There is some dispute as to her speed, but the fact the scars on the Sakito show that she penetrated into the Olympic's iron frame and plates to her midship section for 23 feet of the latter's 38-foot beam, smashing in not only the latter's side plates and between decks but her bottom and keel, to us proves conclusively that the Sakito's navigator did not have the control over her which would enable her to be dead in the water in half the visible distance between her and the anchored Olympic. The Ernest H. Meyer, supra, 497; The Silverpalm, 94 F. 2d 754, 757 (CCA-9); The Catalina, 95 F. 2d 283, 286 (CCA-9). It is possible there is an exception to the rule of these cases where there is a sudden change in visibility such as running into an extraordinary fog density from a much lighter fog area, but no such condition is shown here to aid the Sakito's burden of proof. We hold that the appellants are liable to appellee Hermosa for the total loss of the Olympic.

B. *The liability for the death and personal property loss on the sinking of the Olympic.* The sinking of the Olympic caused the deaths of a number of persons on her and the loss of certain personal effects. The district court held that Sakito solely at fault for these losses. Nippon contends that Hermosa, if not solely at fault, causatively contributed to these losses.

Sakito's causative relation to the loss of life and personal effects is apparent. The question remaining is whether Hermosa is also at fault, in which event one-half of Nippon's liability to the claimants for loss of life and personal effects must be shared by Hermosa. The Chattahoochee, 173 U. S. 540, 554, 555; Erie R. Co. v. Erie and Western Transportation Co., 204 U. S. 220, 226; Aktslsk. Cuzco v. Sucarseco, 294 U. S. 394, 401.

The Olympic was an ocean-going barge of over 100 tons. She was navigating the Pacific at the time she was carrying the pleasure fishermen and others at Horseshoe Kelp and hence required to comply with the requirements of the United States local inspectors as to her structure and otherwise. United States v. Monstad, 134 F. 2d 986, 987 (CCA-9). The Los Angeles local

inspectors had required of the Olympic and other pleasure fishing barges operating in the neighborhood of Los Angeles Harbor and within the control of these inspectors, that the annual thousands of fishermen they carry should be protected from just such a collision as occurred here by having the hull of each compartmented by sufficient water-tight transverse bulkheads to keep the vessel afloat if one of the compartments were flooded.

The specific requirement on the Olympic as a condition for the issuance of the inspectors' certificate[1] permitting her operation was "a sufficient number of transverse watertight bulkheads * * * fitted so that the vessel will remain afloat with positive stability in the event any one main compartment is flooded."

Here was an administrative function of a local matter which Congress had specifically delegated to the local inspectors. They and nobody else could perform it. Cf. Morgan v. United States, 298 U. S. 468, 481. We can see nothing arbitrary or irrational in the bulkhead requirement. On the contrary, it seems to us a wise exercise of the inspectors' administrative duty.

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[1] 46 U. S. C. A. "§ 395. Seagoing barges: certificates. The local inspectors of steamboats shall at least once in ever year inspect the hull and equipment of every seagoing barge of one hundred gross tons or over, and shall satisfy themselves that such barge is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation with safety to life. They shall then issue a certificate of inspection in the manner and for the purposes prescribed in sections 399 and 400. (May 28, 1908, c. 212, § 10, 35 Stat. 428.)

"§ 396. Equipment of barges with life-saving appliances. Every such barge shall be equipped with the following appliances of kinds approved by the board of supervising inspectors: At least one lifeboat, at least one anchor with suitable chain or cable, and at least one life preserver for each person on board. (May 28, 1908, c. 212, § 11, 35 Stat. 428.)

"§ 397. Certificate of inspection and equipment of barge required. A register, enrollment, or license shall not be issued or renewed by any collector or other officer of customs to any such barge unless at the time of issue or renewal such barge has in force the certificate of inspection prescribed by section 395 and on board the equipment prescribed by the preceding section. (May 28, 1908, c. 212, § 12, 35 Stat. 428; Mar. 4, 1915, c. 184, § 6, 38 Stat. 1218.)"

Hermosa failed to install the bulkheads and the inspectors refused their certificate. Instead of withdrawing the Olympic, Hermosa continued in its business of accepting the pleasure fishermen and exposing them to the danger from which the local inspectors' requirements aimed to protect them.

The district court, whose decree preceded our decision in the Monstad case, erred in holding that the Olympic was not under the jurisdiction of the local inspectors and that, even if so, the inspectors had no power to require the bulkheads.

Nippon contends that Hermosa's violation of the requirement of the Congressional statute, occurring at the moment of the drownings and loss of personal effects, places on Hermosa the burden of proving that the absence on the bulkheads not only did not contribute but *"could not have contributed"* to the loss, under the rule of The Pennsylvania, 19 Wall. 125, 136; The Denali, 112 F. 2d 952 (CCA-9); Lie v. S. F. & Portland S. S. Co., 243 U. S. 291, 298. In this we agree.

Hermosa has not sustained this heavy burden of proof. The Olympic sank in between three and four minutes. Hermosa's expert first testified that

> "* * * I believe that, in the first place, if you strike a vessel that hard—I am still going to insist on hitting that is a hard blow, 23 feet—the decks would fall down. That would be the first thing that would happen; and the whole structure of the vessel would collapse and render those bulkheads asunder."

On cross-examination he admitted

> "Q. With such water-tight bulkheads, such a barge would remain afloat much longer than it would without them, isn't that correct?
>
> A. That is right what I believe, Mr. Adams."

The Hermosa has not proved that her violation of the statutory requirement could not have contributed and that if the Olympic had the required bulkheads she could not have remained afloat long enough for all the people on board and the personal effects to be safely removed.

Nippon contends that Hermosa's violation of the statutory requirement for the safety of the lives on board makes Hermosa also in fault for the sinking of the Olympic and that there should be a division of damages for her loss. We do not agree. The statutory requirement was for the protection of lives after such an occurrence as a collision, not for the prevention of collisions.

We hold Hermosa liable to Nippon for half the liability of Nippon to the claimants for the loss of life and personal effects.

It is apparent that the claimants have no interest in the above issues between Nippon and Hermosa. Nippon did not summons the claimants to appear in this court and Hermosa has moved the dismissal of Nippon's appeal because there was no summons of the other claimants for their appearance or severance from the appeal. Obviously, since none of the claimants has any interest in this liability of Hermosa to Nippon, there was no obligation to summons them so far as concerns that issue.

None of the claimants appealed from the district court's decision that Hermosa was not liable to them. Quite likely this is because they were satisfied with the stipulation for the value of the Sakito, given in her release, and did not wish to incur the expense of the appeal. However, since if summoned they would either have been adverse parties to Hermosa or, if severed, no parties at all, Hermosa is not prejudiced by the failure to summons them. The motion to dismiss the appeal is denied.

The interlocutory decree is affirmed in its holding that Nippon is liable in full to Hermosa for the loss of the Olympic. Insofar as it holds that Hermosa is not liable to Nippon for one-half the liability of Nippon for the loss of life and personal effects it is reversed. The cause is remanded for the determination of the amounts of Hermosa's and Nippon's liabilities to each other.

Affirmed in part and reversed in part.

(Endorsed:) Opinion. Filed Jun. 28, 1943. Paul P. O'Brien, Clerk.

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